

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

COMPLAINT OF RANDALL EHRLICH

Docket No. C2020-1

**UNITED STATES POSTAL SERVICE MOTION TO DISMISS WITH PREJUDICE  
THE COMPLAINT OF RANDALL EHRLICH**

(January 13, 2020)

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## INTRODUCTION

At its core, the instant Complaint essentially restates Complainant's efforts to influence postal operations at the Ballard Finance Station located in Seattle, Washington. As the Postal Regulatory Commission ("Commission") noted in Order No. 4924 dismissing the Initial Complaint, the relief Complainant demanded was (and remains) outside the scope of the Commission's statutory authority.<sup>1</sup> Complainant has moderated his demands somewhat in the instant Complaint, but continues to strongly urge the United States Postal Service ("Postal Service") to remove the letter carrier serving complainant's residence from her designated route or entirely from her employment with the Postal Service. Complainant also requests mail delivery service to a mailbox on his front porch, despite well-documented concerns involving Complainant's dog(s), subsequent mail holds (also referred to as 'dog holds') issued pursuant to Postal Service regulations, and reasonable attempts by the Postal Service to reach a compromise mailbox arrangement with Complainant.<sup>2</sup> Accordingly, the instant Complaint should not be considered by the Commission.

The instant Complaint arises from the same allegations the Commission previously considered and the Postal Service's legitimate, warranted suspension of mail service to Complainant's residence because of interference by Complainant's dog(s). Despite the Postal Service offering Complainant reasonable avenues to address this issue, Complainant has unreasonably refused to comply with standard measures designed to protect postal employees. Mail delivery service to Complainant's front door

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<sup>1</sup> Docket No. C2019-1, Order No. 4924, at 11. 39 U.S.C. 3662(a), (c), and (d).

<sup>2</sup> Docket No. C2019-1, Initial Complaint at 11, 15; see *also* Instant Complaint at 13.

was suspended because Complainant's dog was aggressively barking while the letter carrier was present. Delivery service would resume if Complainant simply: (a) moved his mailbox, which is presently mounted along Complainant's driveway fence, by approximately six feet to face the street side of the fence; and (b) assured Postal Service officials at the Ballard Finance Station that his dog(s) will be restrained during delivery hours to ensure the safety of the letter carrier.<sup>3</sup>

## **FACTUAL BACKGROUND**

On November 2, 2018, Randall Ehrlich ("Complainant") filed a complaint ("Initial Complaint") with the Commission.<sup>4</sup> The Initial Complaint sought restoration of mail delivery to Complainant's front door mailbox, severe discipline of three Postal Service employees, and damages, fees, and costs. On November 23, 2018, the Postal Service filed a motion to dismiss the Initial Complaint.<sup>5</sup> Complainant responded to the Postal Service's motion on December 7, 2018.<sup>6</sup> On December 12, 2018, the Commission

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<sup>3</sup> As previously noted by the Postal Service in response to the Initial Complaint, dog attacks and dog bites are a serious threat to letter carriers, as all dogs are territorial and present a biting risk. In 2018, 5,714 Postal Service employees were victimized by dogs. "2019 Dog Bite Prevention Week: Protect Your Postal Carrier from Damaging Dog Bites", DogsBite.org (April 15, 2019, updated December 28, 2019). Highlights of Recent Carrier Attacks are available at: <https://blog.dogsbite.org/2019/04/2019-dog-bite-prevention-week-protect-your-postal-carrier.html>. In 2017, 6,244 Postal Service employees were victimized by dogs. Postal Bulletin, PB 22490 (March 29, 2018) at 3, available at: <https://about.usps.com/postal-bulletin/2018/pb22490/html/cover.htm>. In 2014, 5,767 Postal Service employees were victimized by dogs. Postal Bulletin, PB 22414, (April 30, 2015) at 3; available at: <http://about.usps.com/postal-bulletin/2015/pb22414/pb22414.pdf>. See also Postal Bulletin, PB 22388, (May 1, 2014) at 3; available at: <http://about.usps.com/postal-bulletin/2014/pb22388/pdf/pb22388.pdf>. In 2016 and 2017, Seattle ranked 13<sup>th</sup> in the U.S. for dog attacks of letter carriers. See [https://about.usps.com/news/national-releases/2018/pr18\\_025.htm](https://about.usps.com/news/national-releases/2018/pr18_025.htm).

<sup>4</sup> Docket No. C2019-1, Complaint of Randall Ehrlich, November 2, 2018 ("Initial Complaint").

<sup>5</sup> Docket No. C2019-1, United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, November 23, 2018.

<sup>6</sup> Docket No. C2019-1, Complainant's Response to USPS's Motion to Dismiss, December 7, 2018. The Response includes the declarations of Randall Ehrlich ("Ehrlich Declaration"), Scott Lucas ("Lucas Declaration"), and Adam P. Karp, the Complainant's attorney ("Karp Declaration"). The Commission granted a seven (7) day extension of time to file the Response, pursuant to a motion for extension. See

issued an order: (1) granting the Postal Service's Motion in part; (2) dismissing the Initial Complaint without prejudice; and (3) ordering the Postal Service to advise the Commission of its resolution of the inquiry, or its inability or refusal to reach resolution (under the Commission's rate or service inquiry procedures set forth in 39 C.F.R. § 3031.11), within 45 days of the Order.<sup>7</sup>

Accordingly, the Postal Service submitted a Status Report on January 28, 2019, pursuant to 39 C.F.R. § 3031.11(a) and Commission Order No. 4924.<sup>8</sup> As noted in the Status Report, the Postal Service had contacted Complainant's counsel, Mr. Adam Karp, Esq. on January 9, 2019, scheduling a teleconference to discuss the relief then sought by Complainant to resolve this matter; the parties' respective counsel discussed potential options to resolve the matter on January 10, 2019. Although no definitive resolution was achieved at that time, both parties' counsel expressed interest in continuing settlement discussions to resolve this matter under the applicable rate or service inquiry procedures.

On January 10, 2019, Complainant filed a Petition<sup>9</sup> with the District of Columbia Circuit Court of Appeals ("Court") appealing Order No. 4924. The Commission responded on June 5, 2019,<sup>10</sup> pursuant to D.C. Circuit Rule 28(a)(1), and the Postal Service subsequently filed a motion to intervene pursuant to Federal Rule of Appellate

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Motion for Extension of Time November 30, 2018 ("Motion for Extension of Time"); Order Granting, in Part, Motion for Extension of Time November 30, 2018 (Order No. 4910).

<sup>7</sup> Docket No. C2019-1, Order Granting Motion to Dismiss, December 12, 2018 (Order No. 4924).

<sup>8</sup> Docket No. C2019-1, United States Postal Service Report Concerning Rate or Service Inquiry Resolution Status, January 28, 2019 ("Status Report").

<sup>9</sup> Petition for Review to the District of Columbia Circuit Court of Appeals from Order of the Postal Regulatory Commission, January 10, 2019 (USCA-DC No. 19-1004) ("Petition").

<sup>10</sup> Brief for Respondent, June 5, 2019 (USCA-DC No. 19-1004) ("Response").

Procedure 15(d), Circuit Rule 15(b), and 39 U.S.C. § 3663.<sup>11</sup> On July 3, 2019, Complainant filed a Reply.<sup>12</sup> In its December 10, 2019, Judgment denying Complainant's Petition,<sup>13</sup> the Court found the Commission provided "a well-reasoned justification for its decision." Complainant "failed to show that the Postal Service has offered more favorable rates or terms and conditions [of mail service] to similarly situated individuals."<sup>14</sup> The Court stated the Commission's decision withstood the Court's "deferential," arbitrary-and-capricious standard of review<sup>15</sup> as the Commission "has held that such a showing is required for a successful § 403(c) discrimination claim . . . [a]nd within the four corners of Ehrlich's complaint, there simply are no allegations of such similarly situated Postal Service customers."<sup>16</sup> The Court directed the Clerk to withhold issuance of the mandate until seven (7) days after resolution of any timely filed petition for rehearing or petition for rehearing en banc.<sup>17</sup> Consequently, Complainant filed the instant Complaint on December 23, 2019, as the Court left the door open for Complainant "to re-plead with the allegations of similarly situated individuals that appear in his response."<sup>18</sup>

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<sup>11</sup> Motion of the United States Postal Service for Leave to Intervene, February 6, 2019 (USCA-DC No. 19-1004).

<sup>12</sup> Reply Brief of Appellant, Submitted Without Oral Argument, July 3, 2019 (USCA-DC No. 19-1004) ("Reply").

<sup>13</sup> Judgment, December 10, 2019 (USCA-DC No. 19-1004) ("Judgment"). Pursuant to D.C. Circuit Rule 36, the disposition was not published as the Court determined no published opinion was warranted. See D.C. CIR. R. 36(d).

<sup>14</sup> Judgment at 10.

<sup>15</sup> *Id.* at 3. See *Alliance of Nonprofit Mailers v. Postal Regulatory Comm'n*, 790 F.3d 186, 193 (D.C. Cir. 2015).

<sup>16</sup> *Id.* at 2-3.

<sup>17</sup> See FED. R. APP. P. 41(b); D.C. CIR. R. 41.

<sup>18</sup> Judgment at Footnote 1. See also Docket No. C2020-1, Complaint of Randall Ehrlich, December 23, 2019 ("Instant Complaint").

In the instant Complaint, Complainant claims the Commission has jurisdiction to hear his claims pursuant to 39 U.S.C. § 3662(a) and 39 U.S.C. § 403(c).<sup>19</sup> Pursuant to 39 C.F.R. § 3030.12(b),<sup>20</sup> the Postal Service hereby submits this motion to dismiss the instant Complaint with prejudice. As set forth more fully below, the Commission should dismiss the instant Complaint with prejudice for Complainant's failure to state a claim upon which relief may be granted, mootness, and res judicata.

The Initial and instant Complaints each involve the provision of delivery service by the Postal Service to 5833 7<sup>th</sup> Avenue NW, Seattle, Washington 98107. This physical address would normally receive mail delivery, which requires the city letter carrier to dismount from the postal vehicle to deliver mail to the mail receptacle. In the "Memo of Understanding Discontinuance of Mail Delivery" dated July 20, 2015, and signed by Complainant (the "MOU"), Complainant acknowledged he "may be required to relocate [his] mailbox to a place (approved by the Postal Service), which allows the Letter Carrier safe access to deliver the mail, without interference from any dog(s) under [his] control."<sup>21</sup> In the MOU, Complainant also acknowledged that his "failure to control [his] dog(s) and comply with the above agreement, may result in discontinuance of delivery service."<sup>22</sup> The Postal Service informed Complainant that, as a result of interference by an unrestrained canine, the letter carrier was unable to deliver mail to Complainant's address.<sup>23</sup> In subsequent communications between Complainant and

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<sup>19</sup> *Id.* at 1.

<sup>20</sup> Pursuant to this rule, the Postal Service's Answer is deferred. If the Commission denies the Postal Service's motion or postpones disposition, the Postal Service's Answer would be due within ten (10) days of the Commission's action.

<sup>21</sup> Docket No. C2019-1, United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, November 23, 2018, Exhibit A – Declaration of John Bell, Attachment 2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

John Bell, former Supervisor, Customer Service at the Ballard Finance Station, Mr. Bell informed Complainant that, for the safety of Postal Service employees,<sup>24</sup> deliveries to his front door had been suspended.<sup>25</sup>

The Postal Service provided Complainant a copy of its policy stating that, while letter carriers make every effort to deliver mail, they are not required to deliver mail where dogs or other animals may interfere.<sup>26</sup> Sometime in 2015, the Postal Service discontinued mail delivery to Complainant's front door due to the aggressive, threatening behavior of a large German Shepherd dog located inside Complainant's residence.<sup>27</sup> Since that time, Complainant has had one or more dogs at his residence (see Instant Complaint at 5, 10), has not installed a curbside mailbox, and has refused to relocate his mailbox to the street-facing side of his fence as advised by the Postal Service.<sup>28</sup>

According to Section 631.23 of the Postal Operations Manual ("POM") (as revised effective Apr. 26, 2018), delivery "may be provided to boxes located at or near the door of a business or residential delivery point, or through a door slot, only with prior

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<sup>24</sup> *Id.*, Exhibit A – Declaration of John Bell, Attachment 1. See also Postal Operations Manual ("POM") 623.3 ("Delivery service may be suspended when there is an immediate threat (including, but not limited to, threats due to loose animals) to the delivery employee, mail security or postal property.").

<sup>25</sup> *Id.*, Exhibit A – Declaration of John Bell.

<sup>26</sup> See Notice 204, Dog Days, Post Offices Brace for Summertime Bites (Notice distributed to customers reminding customers to do their part in preventing dog bites to letter carriers), available at: <http://about.usps.com/notices/not204.pdf>; Handbook M-41, City Delivery Carriers Duties and Responsibilities, Section 133.5 (which provides that carriers are not required to deliver mail where dogs or other animals interfere); Handbook EL-814, Postal Employee's Guide to Safety, Section IX.D,1 (2013) (which provides that carriers are not required to deliver mail when an animal threatens them).

<sup>27</sup> Docket No. C2019-1, United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, November 23, 2018, Exhibit A – Declaration of John Bell, Attachment 1.

<sup>28</sup> As a compromise gesture, when Complainant relocated his mailbox to his driveway fence, instead of the sidewalk location directed by the Postal Service, the Postal Service stated a fence relocation was acceptable if the mailbox was located at the end of the fence, facing the street. However, Complainant refused to relocate the mailbox to the location directed by the Postal Service for operational reasons that were fully explained to Complainant. *Id.*, Exhibit A – Declaration of John Bell, Attachments 3-4.



approval from the District Manager, and only if the box or mail slot can be efficiently, safely, and conveniently served by the carrier.” Furthermore, according to POM § 623.21, Complainant is “responsible for keeping the approach to the mailbox clear to facilitate delivery”.<sup>29</sup> In this case, the letter carrier regularly assigned to the route where Complainant’s residence is located experienced a legitimate safety issue making door deliveries to Complainant’s residence because of the dog’s aggressive, threatening behavior. The Postal Service reasonably determined that mail delivery service to Complainant’s front door needed to be suspended because of the dog’s behavior. Complainant did not have a curbside box and failed to take prompt corrective action by installing one after Postal Service officials properly notified him to do so. In an effort to resolve the issue, the Postal Service decided that mail delivery service could resume if Complainant placed a mailbox on his fence facing the street, but Complainant refused to do so, instead placing the mailbox approximately ten (10) feet six (6) inches from the sidewalk on the fence along his driveway. To date, Complainant has refused to relocate the mailbox along his fence to a location that is operationally reasonable and safer for the letter carrier (based on line of sight and earlier concern about dog(s) at Complainant’s residence).<sup>30</sup>

Since receiving and signing off on the MOU, Complainant has not taken the requested actions necessary to restore mail delivery service to his residence. While Complainant has spoken with a delivery supervisor on many separate occasions, he has still refused to install a curbside box, or move his mailbox to the operationally

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<sup>29</sup> See also POM § 632.14.

<sup>30</sup> The Postal Service has long stressed to its customers the need for mailboxes with safe and efficient locations. See, e.g., “Mailbox Improvement Week” article in Postal Bulletin, PB 22310 (May 5, 2011) at 3; available at: [https://about.usps.com/postal-bulletin/2011/pb22310/html/info\\_001.htm](https://about.usps.com/postal-bulletin/2011/pb22310/html/info_001.htm) .

requested location on his fence, and despite the July 2015 MOU, he has not adequately restrained the current dog(s) so that it or they would not and could not interfere or potentially interfere with mail delivery service to his residence. Thus, the Postal Service is currently returning mail addressed to Complainant's residence to sender.

## **ARGUMENT**

### **I. COMPLAINANT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED OR UPON WHICH THE COMMISSION CAN ISSUE A REMEDY.**

Complainant has failed to allege facts sufficient to support any of his allegations, thereby requiring dismissal of the instant Complaint with prejudice. The Commission's rules require that a complainant set forth the facts and circumstances that give rise to the complaint and clearly identify and explain how the Postal Service's action or inaction violates applicable statutory standards or regulatory requirements.<sup>31</sup> These standards are similar to the Federal Rules of Civil Procedure, which require that a complainant provide a "short and plain statement of the claim showing that the pleader is entitled to relief."<sup>32</sup>

Further, federal courts are increasingly requiring more specific factual allegations when determining whether a pleading should be dismissed with prejudice for failing to state a claim upon which relief can be granted.<sup>33</sup> In *Bell Atlantic Corp. v. Twombly*<sup>34</sup> and *Ashcroft v. Iqbal*,<sup>35</sup> the Supreme Court established that the heightened pleading standard requires a pleading to contain more than "'naked assertions' devoid of 'further

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<sup>31</sup> 39 C.F.R. §§ 3030.10(a)(1) and (a)(2).

<sup>32</sup> FED. R. CIV. P. 8(a)(2).

<sup>33</sup> FED. R. CIV. P. 12(b)(6).

<sup>34</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>35</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

factual enhancement.”<sup>36</sup> Rather, a pleading “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”<sup>37</sup> These standards serve to ensure that complainants put the opposing parties on sufficient notice of the actual claims at issue, and increase the likelihood that complainants have factual support for their claims prior to expending the resources of the relevant tribunal and opposing parties. These same interests are served in the context of Commission complaints, and the Commission should follow the Supreme Court’s holdings in *Twombly* and *Iqbal* as the instant Complaint, like the Initial Complaint, fails to allege any viable claim and must be dismissed with prejudice based on Complainant’s inability to present any issues of material fact or law that establish a claim upon which the Commission can grant relief.

#### **A. The Commission’s Complaint Jurisdiction Is Limited.**

Congress has provided the Commission limited jurisdiction to entertain complaint cases against the Postal Service. Specifically, the Commission’s authority to adjudicate complaints, which is set forth in 39 U.S.C. § 3662(a), allows an interested person to bring a complaint when “the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or [chapter 36] (or regulations promulgated under any of those provisions) ....”

The Commission has consistently held that its jurisdiction is limited to alleged violations of sections enumerated in 39 U.S.C. § 3662 or Chapter 36.<sup>38</sup>

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<sup>36</sup> *Id.* at 678 (citing *Twombly*, 550 U.S. at 557).

<sup>37</sup> *Id.* (citing *Twombly* at 570).

<sup>38</sup> Docket No. C2016-2, Order No. 2585, Order Granting Motion to Dismiss, July 15, 2015, at 8, 21 (citing *Goodman* Motion to Dismiss at 4; citing Order No. 1762 at 10; Order No. 2377 at 6; Order No. 471 at 3).

**B. Complainant Fails To Allege Any Factual Assertions Sufficient To Support His Allegations Of Discrimination.**

In this instance, Complainant identifies 39 U.S.C. § 403(c)<sup>39</sup> and 39 U.S.C. § 3662(a) as the jurisdictional bases for the instant Complaint. However, Complainant does not sufficiently demonstrate how the Postal Service violated 39 U.S.C. § 403(c) or allege facts that are relevant to any of the other enumerated provisions in 39 U.S.C. § 3662(a) (*i.e.*, §§ 101(d), 401(2), 404a, 601, or chapter 36).

As in the Commission's *Goodman* proceeding,<sup>40</sup> Complainant invokes "Commission jurisdiction under Section 3662(a), but fail[s] to adequately address specific sections listed within section 3662(a) that may be violated by the Postal Service's actions. In the absence of specific material allegations upon which relief may be granted, the Commission [must] assess the validity of the Complaint against the statutory provisions cited, consider the general allegations and facts presented in the Complaint, and consider the Postal Service's Motion to Dismiss."<sup>41</sup> Here, Complainant claims he is just like "customers with *well-behaved dogs* and any other resident whose premises *present no dangers to the letter carrier*" (emphasis added), yet he has been and remains the owner of at least one dog that behaved in such a manner that a dog hold was issued.<sup>42</sup>

As the Commission noted in *Goodman*, Section 403(c) prohibits "undue or unreasonable discrimination among users of the mails" and "undue or unreasonable

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<sup>39</sup> Instant Complaint at 1.

<sup>40</sup> Docket No. C2015-2, *In the matter of James D. Goodman and Rosalyn Goodman*, First Amended Complaint of James D. Goodman and Rosalyn Goodman Regarding Failure and Refusal to Deliver Mail by the US Postal Service to 1600 Entre Colinas Place, Pomona, California, April 23, 2015.

<sup>41</sup> Docket No. C2015-1, Order No. 2585, Order Granting Motion to Dismiss, July 25, 2015, *supra* note 19, at 8.

<sup>42</sup> Instant Complaint at 5-6, 10.

preferences to any such user,” and applies to actions of the Postal Service “[i]n providing services and in establishing classifications, rates, and fees under [Title 39].”<sup>43</sup> The Commission has recognized that an essential element of a Section 403(c) claim is the demonstration that a claimant “is similarly situated to the other mailer or mailers who have been offered more favorable rates or terms and conditions of service.”<sup>44</sup> As stated by the Commission,

[i]n order to establish [a] claim of undue discrimination, [a claimant] must establish three elements. First, it must establish that it has been offered less favorable rates or terms and conditions than one or more other mailers. Second, it must demonstrate that it is similarly situated to the other mailer or mailers who have been offered more favorable rates or terms and conditions of service. Third, it must demonstrate that there is no rational or legitimate basis for the Postal Service to deny it the more favorable rates or terms and conditions offered to the others. *Id.*

In Order No. 4924, which disposed of Complainant’s initial Complaint, the Commission followed the above reasoning in *Goodman*: while acknowledging the Complainant had alleged “several perceived intimidating or aggressive actions from the carrier[,]” the Commission concluded:

Even so, the Complainant has failed to show that the Postal Service has offered more favorable rates or terms and conditions to similarly situated individuals. Indeed, the Complainant acknowledges that others similarly situated have also experienced the discontinuation of mail delivery. Complainant also alleges that other dog owners have experienced intimidating or aggressive gestures or actions from the letter carrier....While these allegations, if true, demonstrate unacceptable conduct by a Postal Service employee, they fail to support a claim of discrimination among mail users pursuant to § 403(c).<sup>45</sup>

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<sup>43</sup> Order No. 2585, *supra* note 40, at 11.

<sup>44</sup> Docket No. C2009-1, Order No. 718, Order on Complaint, April 20, 2011, at 28.

<sup>45</sup> Docket No. C2019-1, Order No. 4924, Order Granting Motion to Dismiss, December 12, 2018, at 10.

Although section 403(c) is an enumerated provision in 39 U.S.C. § 3662(a), Complainant has failed to establish that the Postal Service has *unduly or unreasonably* discriminated against him<sup>46</sup> by suspending mail delivery service to his residence, given the presence of dog(s) on the premises,<sup>47</sup> a dog hold, and Complainant's on-going failure to move the mailbox to the postal-approved location for the delivery of mail<sup>48</sup> after being notified to do so by Postal Service officials.<sup>49</sup>

This matter is similar to that in the *Goodman* proceeding, which involved disruption of mail delivery to the Goodman's home as a result of interference by a dog.<sup>50</sup> The Commission's final order resulted in dismissal of the Goodmans' claim on grounds, in part, that the Goodmans failed to state a claim upon which relief could be granted by the Commission under 39 U.S.C. § 3662(a)'s enumerated provisions of the Postal Reorganization Act, including, for example, 39 U.S.C. § 403(c): "Here, Complainants have not alleged any facts that if proven true demonstrate their treatment is discriminatory. They have not alleged specific facts that if proven true would demonstrate their dog is not interfering with or harassing the carrier."<sup>51</sup>

Also similar to the facts behind the Commission's holding in *Goodman*, Complainant in the present matter has made no showing that other similarly situated customers with aggressive dogs are receiving mail delivery service at their front door without reasonable requests from the Postal Service to relocate their mailboxes. In fact,

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<sup>46</sup> 39 U.S.C. § 403(c).

<sup>47</sup> Initial Complaint at 4-5; see *also* Docket No. C2019-1, United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, November 23, 2018, Exhibit A – Declaration of John Bell, Attachment 1.

<sup>48</sup> POM § 623.1

<sup>49</sup> Docket No. C2019-1, United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, November 23, 2018, Exhibit A – Declaration of John Bell, Attachment 1.

<sup>50</sup> Order No. 2585, *supra* note 40, at 1.

<sup>51</sup> *Id.* at 12.

the Commission determined as much in granting the Postal Service's motion to dismiss Complainant's initial Complaint in Docket No. C2019-1: "Complainant has failed to show that the Postal Service has offered more favorable rates or terms and conditions to similarly situated individuals." Order No. 4924 at 10. It should be noted that the Commission came to this conclusion after considering the numerous statements and declarations of other postal customers which were made a part of Complainant's initial Complaint, and which are incorporated by reference in the instant Complaint. See instant Complaint at 11-12.

Here, Complainant admits he has been and remains the owner of at least one dog whose behavior required the issuance of a dog hold. Instant Complaint at 5-6, 8, 10. While Complainant alleges he is just like "customers with well-behaved dogs and any other resident whose premises present no dangers to the letter carrier [,]" he offers no evidence to suggest that the Postal Service affords similarly situated customers, *i.e.*, dog owners with dog holds, more favorable treatment than him. *Id.* at 13. Nor did the Commission make any finding of more favorable treatment in deciding the disposition of the initial Complaint. Order No. 4924 at 10.

In evaluating claims of discrimination among mail users, the Commission follows the guidance set forth in *Egger v. USPS*, 436 F. Supp. 138 (W.D. Va. 1977).<sup>52</sup> In *Egger*, the Court held that it is "obvious that the Postal Service may provide different levels of delivery service to different groups of mail users so long as the distinctions are reasonable." *Egger*, 436 F. Supp. at 142. The Commission stated in Order No. 2585, "the Postal Service may differentiate among customers where the differences have a

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<sup>52</sup> Order No. 2585 at 12.

rational basis.”<sup>53</sup> Complainant has not demonstrated that the Postal Service’s legitimate reason for suspending mail delivery service to his residence or requiring the relocation of his mail box was discriminatory in any way.

Complainant has not specifically stated the basis upon which he believes the Postal Service is offering him less favorable treatment than similarly situated individuals. However, assuming *arguendo* that Complainant believes the entire class of dog owners receives less favorable rates or terms and conditions than non-dog owners, he has failed to present any evidence of such less favorable treatment. On the contrary, Complainant identified neighbor, and fellow dog owner, Lisa Sorensen, as someone who is “similarly situated to [him], but [] “enjoy[ed] residential mail delivery....”<sup>54</sup> The fact that Ms. Sorensen has a dog and receives residential mail delivery illustrates that the Postal Service does not discriminate against dog owners.

It is evident from the facts, as Complainant has alleged them, that other customers similarly situated to Complainant (*i.e.*, dog owners) have experienced the discontinuation of mail delivery service, while others, such as Ms. Sorensen continue to receive residential mail delivery service. Specifically, Complainant’s initial complaint discusses similar treatment of Peggy Hougardy (Initial Complaint at 2-4), and notes that even customers without dogs have been denied service due to neighboring homes with dogs (*id.* at 13-14). In addition, the Declaration of Scott Lucas, attached to Complainant’s Reply to the original Motion to Dismiss in Docket No. C2019-1, points out non-delivery and the issuance of a dog warning due to an unsecured dog. Another attachment to Complainant’s Reply in that docket, the declaration of Adam Karp, notes

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<sup>53</sup> *Id.* at 12-13.

<sup>54</sup> Instant Complaint at 13.



that there were no less than 13 customers receiving similar treatment as Complainant due to dogs or the presence of dogs at or around such customers' homes.<sup>55</sup>

Thus, although some customers who are dog owners may have service suspended due to the aggressive actions of their dogs, other customers without dogs, or those that are dog owners, may continue to receive regular and consistent delivery service if they do not otherwise present safety or operational concerns. This does not mean that Complainant, or dog owners more generally, suffer undue or unreasonable discrimination. Rather, delivery service is being reasonably tailored to fit the particular circumstances of each customer's residence. Complainant has not offered any evidence to suggest that the Postal Service provided mail delivery service to any dog owners despite a dog hold being in place. It is true that dog owners with well-behaved dogs are treated differently than those dog owners with dog holds in place, because well-behaved dogs do not pose a threat to the letter carrier's safety.

The Postal Service has a legitimate, non-discriminatory interest in ensuring its letter carriers' safety, an interest previously recognized by the Commission as legitimate. The Commission has also recognized that the suspension of delivery service to addresses of known dog concerns reasonably relates to achieving that interest.<sup>56</sup> The Postal Service's response to the presence of Complainant's dog(s) in this present matter – suspending mail delivery service, advising on a proper mailbox location, and willingness to compromise by allowing relocation of the mailbox to an

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<sup>55</sup> See Docket No. C2019-1, Initial Complaint at 2-4, 13-14; Complainant's Reply to USPS's Motion to Dismiss, December 7, 2019.

<sup>56</sup> Order No. 2585 at 12.

appropriate area on Complainant's fence<sup>57</sup> -- was and remains entirely reasonable and in line with the Commission's decision in *Goodman*: "The Postal Service's response to the reported dog interference and/or harassment is reasonably related to the situation presented by the pleadings."<sup>58</sup> Furthermore, Complainant here, as in *Goodman*, "offer[s] no response or explanation about their dog's behavior when the carrier approaches the door."<sup>59</sup> Additionally, Complainant has not alleged that the Postal Service violated any of the other 39 U.S.C. § 3662(a) enumerated provisions (*i.e.*, §§ 101(d), 401(2), 404a, 601, or chapter 36).

Even if Complainant had alleged violations of those provisions, the alleged facts stated in the instant Complaint are not relevant to those sections. Complainant alleges the Postal Service "stopped mail" service to his residence due to a "dog hold."<sup>60</sup> A "dog hold" is a reasonable basis for withdrawal of mail delivery service by the Postal Service.<sup>61</sup> Complainant even admits the Postal Service communicated this reason to him several times in 2015, more specifically on July 20<sup>th</sup>, August 15<sup>th</sup>, September 22<sup>nd</sup> and 30<sup>th</sup>, and October 20<sup>th</sup>, as the basis for suspension of mail delivery service to his residence.<sup>62</sup> As the Postal Service has not unduly or unreasonably discriminated among users of the mails as required under either 39 U.S.C. § 403(c) or 39 U.S.C. § 3662(a), Complainant has failed to state a claim upon which relief can be granted. Therefore, the instant Complaint must be dismissed with prejudice.

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<sup>57</sup> Docket No. C2019-1, United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, November 23, 2018, Exhibit A - Declaration of John Bell.

<sup>58</sup> Order No. 2585, *supra* note 40, at 13 (citing Motion to Dismiss, Exhibit 1 at 2).

<sup>59</sup> *Id.*

<sup>60</sup> Instant Complaint at 5, 6, 8, 10.

<sup>61</sup> POM § 623.3. See also Publication 174, How to Avoid Dog Bites: Dogs and Dog Repellent (Sept. 2008).

<sup>62</sup> Initial Complaint at 6-8.

In addition to ensuring carrier safety by minimizing the risk of dog bites and/or attacks on postal employees,<sup>63</sup> the Postal Service has a second reasonable basis for withdrawing mail delivery service at Complainant's residence, more specifically Complainant's front door. Contrary to specific mailbox placement guidance the Postal Service relayed to Complainant on multiple occasions,<sup>64</sup> Complainant admitted he "mounted a second mailbox on his side fence, which was approximately 10 feet 6 inches from the sidewalk."<sup>65</sup> Pursuant to POM Section 623.1, the Postal Service "may withdraw service to a delivery point if a customer does not provide a suitable mail receptacle in the postal-approved location for the delivery of mail after being so notified by local officials by PS Form 1507, Request to Provide Mail Receptacle (city delivery routes); by PS Form 4056, Your Mailbox Needs Attention (rural and highway contract routes); or *by written communication*." (Emphasis added.) Despite at least one site visit from a Postal Service official to assist Complainant with identifying appropriate mailbox placement so that mail delivery service to his residence could resume, Complainant hung the mailbox along his driveway side of the fence "10 feet 6 inches [away] from the sidewalk" instead of placing the mailbox either at the curb or on the front of the fence facing the street, as advised.<sup>66</sup> To date, Complainant has refused to comply with the

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<sup>63</sup> There were nearly 350,000 people treated at hospital emergency rooms for non-fatal dog-related injuries in 2017 and insurers paid \$675 million in claims related to dog bites in 2018, according to estimates from the Insurance Information Institute. National Dog Bite Prevention Week was April 8-14 in 2018 and April 7-13, 2019, respectively; available at: <https://www.youtube.com/watch?v=v3Q2SV70mDM>; <https://www.avma.org/events/national-dog-bite-prevention-week>.

<sup>64</sup> Instant Complaint at 6, 8, 11. See *also* Initial Complaint at 6-8, 11; United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, November 23, 2018, Exhibit A – Declaration of John Bell.

<sup>65</sup> Instant Complaint at 9, 11; See *also* Initial Complaint at 10.

<sup>66</sup> *Id.* See *also* Initial Complaint at 6-8, 11; United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, November 23, 2018, Exhibit A – Declaration of John Bell, Attachments 2 and 3.

Postal Service's request that his mailbox be relocated to location on his fence that is safer for a letter carrier, thus causing mail delivery service to Complainant's residence to remain suspended. The Postal Service's legitimate, non-discriminatory action has a basis in fact, one that Complainant has failed to refute. Therefore, the instant Complaint must be dismissed with prejudice.

**C. The Commission Lacks The Statutory Authority To Grant The Relief Complainant Is Seeking.**

Complainant has requested relief which is outside the Commission's statutory authority and not within the Commission's means to grant under Title 39 of the Code of Federal Regulations or Chapter 5 of Title 39 of the U.S. Code. Specifically, Complainant has requested the Commission grant:

- A. That mail service be restored to Ehrlich's premises by delivery to the mailbox at his front door;
- B. That all discriminatory acts and omissions against Ehrlich cease immediately; and
- C. For such other and further relief as the Commission may deem just and proper.<sup>67</sup>

Complainant also requests that the Commission "take yet stronger action and urge [the letter carrier's] termination."<sup>68</sup>

As an initial matter, it should be noted that the Commission has already concluded that it does not have authority to remove the letter carrier.<sup>69</sup> Further, the Commission rightly noted that even if it could grant such relief, such an action would not "achieve compliance" because even if the letter carrier were removed, it would not affect

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<sup>67</sup> Instant Complaint at 15-16.

<sup>68</sup> *Id.* at 13-14. See also Initial Complaint at 15.

<sup>69</sup> Order No. 4924 at 11 (writing that "These actions are outside the Commission's authority to grant relief. Labor and personnel decisions are the purview of the Postal Service as the postal operator.").

the Postal Service's policy on suspension of delivery service due to an aggressive dog at the address.<sup>70</sup>

In addition, as the Postal Service argued in its reply brief in the C2019-1 docket, 39 C.F.R. § 3030.50 does not authorize the Commission, assuming it finds a complaint is justified here, to award monetary "damages, fees and costs". 39 C.F.R. § 3030.50 only authorizes "fines," pursuant to 39 U.S.C. § 3662(c) and (d), which would be paid to the general fund of the Treasury Department of the United States for "deliberate non-compliance" by the Postal Service, and such remedy is considered "extraordinary relief" under the language of § 3030.50.<sup>71</sup> Here, as in *Goodman*, the Commission need not reach the validity of any request for relief through Commission sanctions because the Complaint should be dismissed with prejudice for lack of jurisdiction, failure to state a claim for which relief may be granted, and mootness.<sup>72</sup> The facts as alleged in both the instant Complaint and this Motion to Dismiss With Prejudice do not meet the requirements of § 3030.50 for such relief.

Even assuming *arguendo* that the Commission finds deliberate non-compliance with applicable postal regulations on the Postal Service's part, the Commission may only order a fine for each incidence of non-compliance, and only after considering the nature, circumstances, extent, and seriousness of the non-compliance.<sup>73</sup> In this case, the intentional and persistent non-compliance with postal regulations is on the part of

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<sup>70</sup> *Id.*

<sup>71</sup> Docket No. C2019-1, Initial Reply Brief, United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, Nov. 23, 2018, at 12.

<sup>72</sup> Docket No. C2016-2, Order No. 2585, Order Granting Motion to Dismiss, July 15, 2015, at 15 (citing *Goodman* Complaint at 9; Motion to Dismiss at 11-12).

<sup>73</sup> 39 C.F.R. § 3030.50(b).

Complainant, not the Postal Service. Therefore, the Commission cannot award any relief in the form of a penalty.

In addition, Complainant's request to resume mail delivery service to the mailbox at his front door, if granted, could potentially expose the letter carrier to harm. As a compromise, the Postal Service has agreed to resume mail delivery service to Complainant's home if Complainant's mailbox is moved to a more operationally accessible location on the property that is safer for a letter carrier. To date, Complainant has refused to do so. Thus, the Postal Service is currently returning mail addressed to Complainant's address to sender.

## **II. THE POSTAL SERVICE HAS ALREADY OFFERED ANY REMEDY THE COMMISSION MIGHT PROVIDE.**

The instant Complaint should also be dismissed with prejudice as moot. Mootness exists "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."<sup>74</sup> Mootness also occurs when "events have so transpired that [a judicial] decision will neither presently affect the parties' rights nor have a more than speculative chance of affecting them in the future."<sup>75</sup> Mootness can arise at any point during litigation.<sup>76</sup> When mootness occurs, the case should be dismissed with prejudice. Here, Complainant asserts that the Postal Service has refused to deliver mail to his residence, seeks to have mail delivery re-established, and strongly urges that steps be taken to terminate the current letter carrier from her

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<sup>74</sup> *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1245 (11<sup>th</sup> Cir. 2003).

<sup>75</sup> *Ralls Corp. v. Committee on Foreign Inv. in U.S.*, 758 F.3d 296, 321 (D.C. Cir. 2014) (citing *Clarke v. United States*, 915 F.2d 699, 701 (D.C.Cir.1990)).

<sup>76</sup> *Steffel v. Thompson*, 415 U.S. 452, 459, n.10 (1974).

employment with the Postal Service.<sup>77</sup> The Postal Service's actions have effectively rendered the instant Complaint moot and it should accordingly be dismissed with prejudice.

According to Postal Service regulations, door delivery or curbside delivery are provided at the Postal Service's discretion so long as they can be efficiently, safely, and conveniently served by the letter carrier.<sup>78</sup> Such regulations also place an obligation on Postal Service customers to accommodate the Postal Service's chosen delivery mode, and allow for General Delivery Service at the nearest postal facility where carrier delivery emanates, in the event of refusal by a customer to accommodate such delivery mode.<sup>79</sup>

In this case, the record clearly indicates that Postal Service officials carefully evaluated Complainant's circumstances when initially requesting the installation of a curbside mailbox, and subsequently modified this request with a further accommodation by allowing placement of a mailbox on a fence off the curb and closer to Complainant's front door.<sup>80</sup> However, Complainant placed his mailbox ten (10) feet six (6) inches from the sidewalk on the fence along his driveway in a location where the letter carrier's back would be to Complainant's front door. This location does nothing to avoid the original and continuing threat of a potential dog attack, or to meet operational feasibility for a

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<sup>77</sup> "Indeed, given [the letter carrier's] history of recalcitrant and abusive behavior, the PRC should take yet stronger action and urge her termination." Instant Complaint at 13.

<sup>78</sup> POM §§ 631.21 and 631.23.

<sup>79</sup> *Id.* at § 141.2, 631.82.

<sup>80</sup> Docket No. C2019-1, United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, November 23, 2018, Exhibit A – Declaration of John Bell. See *also* Instant Complaint at 9-10.

letter carrier servicing the address, which prompted the rightful and allowable discretionary application of a dog hold in the first place, and is in contravention of line-of-sight requirements for mailboxes.<sup>81</sup> As a result, Postal Service officials asked Complainant to move his mailbox to a different location on the fence, and have assured Complainant that, if so moved, residential delivery to his mailbox would resume.

Complainant repeatedly has refused to comply with the Postal Service's guidance and regulations, which caused his ongoing non-delivery complaints. The Postal Service has taken the necessary actions to fully resolve this matter, but Complainant's inaction is the reason why the Postal Service has not resumed mail delivery service at Complainant's residence. But for Complainant's actions, or rather his inaction, this Complaint would have been resolved years ago in accordance with the Postal Service's policies. As such, the Postal Service urges that the Commission dismiss this Complaint with prejudice for mootness.

### **III. RES JUDICATA OPERATES TO PRECLUDE THE COMMISSION FROM CONSIDERING THE ALLEGATIONS PUT FORTH IN THE COMPLAINT.**

The dual doctrines of claim preclusion and issue preclusion, collectively known as "res judicata," serve to protect against "the expense and vexation attending multiple law suits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions."<sup>82</sup> Claim preclusion bars successive litigation of the very same claim, even if the issues were not raised in the earlier suit.<sup>83</sup>

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<sup>81</sup> *Id.*; See also POM § 632.14; Mailbox Guidelines, available at: <https://www.usps.com/manage/mailboxes.htm>.

<sup>82</sup> *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citing *Montana v. United States*, 440 U.S. 147, 153-154 (1979)).

<sup>83</sup> *Taylor*, 553 U.S. at 892.



Issue preclusion bars successive litigation of an issue of fact or law actually litigated and resolved, even if the issue recurs in the context of a different claim.<sup>84</sup>

Complainant's instant Complaint repeats much of his initial Complaint, Docket No. C2019-1, which the Commission has already determined did not present a claim upon which it could provide relief. The Commission has previously considered, and rejected, Complainant's allegations that the Postal Service violated 39 U.S.C. section 403(c)'s prohibition against discrimination in providing mail services to Complainant. In the instant Complaint, Complainant does not introduce facts surrounding his dog hold or the Postal Service's treatment of similarly situated customers that would be material to establishing a claim of undue or unreasonable discrimination. Instead, Complainant generally parrots the same arguments that he made in Docket No. C2019-1.<sup>85</sup> The Commission previously determined that the allegations Complainant has now raised in two separate docket proceedings do not constitute a cognizable 403(c) claim. Accordingly, *res judicata* should preclude Complainant from successfully repeating the same claims in this instant proceeding.

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<sup>84</sup> *Id.*

<sup>85</sup> Complainant does note the experience of resident Lisa Sorenson on page 13 of the instant Complaint; she was not named in the initial Complaint, but was mentioned in Complainant's response to the motion to dismiss in the C2019-1 docket. See Complainant's Response to USPS's Motion to Dismiss, December 7, 2018, at 10. However, the instant Complaint references Ms. Sorenson in the context of noting the experience of "customers with well-behaved dogs and any other resident whose premises present no dangers to the letter carrier." Instant Complaint at 13. It is precisely because Complainant's dog was *not* well-behaved, and *did* represent a potential danger to the letter carrier, that he has been treated differently than other customers such as Ms. Sorenson. This argument by Complainant is not new, and actually works to support the Postal Service's position in this instant proceeding as well as the Commission's decision in the initial proceeding.

## **CONCLUSION**

For the reasons set forth above, the Commission should dismiss the instant Complaint with prejudice for lack of jurisdiction, failure to state a claim upon which relief may be granted under 39 U.S.C § 3662, mootness, and res judicata.

Respectfully submitted,

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